

August 11, 2005

Alona Clifton, Member
Board of Trustees
Peralta Community College District
[Address Redacted]
Oakland, CA 94606

**Re: Your Request for Advice
Our File No. A-05-119**

Dear Ms. Clifton:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that there are other bodies of law, separate and apart from the Act's conflict of interest provisions, which may apply to your situation. For example, Government Code section 1090 generally provides that an officer or employee of a governmental agency may not have an interest in a contract with the officer or employee's own agency. This letter is limited solely to the provisions of the Act. The Commission has no authority to advise on section 1090. We recommend seeking advice from the Attorney General's office if you believe section 1090 may be implicated by your facts.

QUESTION

Does the Act require you to disqualify yourself from voting on a contract decision involving a developer where (1) you received campaign contributions from the developer in the past and/or (2) the developer is contracting with a nonprofit agency for which you serve as president and from which you receive reimbursements for expenses?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

CONCLUSION

The facts you provided does not indicate that there is a substantial likelihood that North County Center for Self Sufficiency Corporation will incur any material financial effect as a result of the governmental decision you would like to make. Therefore, the Act does not require you to disqualify yourself from making the decision in question and we do not further analyze your potential economic interest in NCCSSC.

FACTS

You are an elected member of the Board of Trustees for a community college district. The Board of Trustees will be asked to approve a contract with a local developer. The proposed contract establishes a one-year process for the district to be in exclusive negotiation with the developer for the sole purpose of determining the feasibility of a joint development on district land.

You also volunteer as president of North County Center for Self Sufficiency Corporation (NCCSSC),² a local nonprofit agency's Board of Directors. The North County Center for Self Sufficiency Corporation is exempt from taxation under Internal Revenue Code section 501(c)(3). The same developer is developing land in which NCCSSC will own the land. You do not receive a salary or stipend from NCCSSC. You are however, reimbursed for expenses that you incur as a direct result of matters related to the nonprofit agency's Board of Directors.

In addition, you have received campaign contributions from the developer in the past, but you have no personal ownership in the subject building or land.

ANALYSIS

The Act stipulates that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) As a public official, you are prohibited from making a governmental decision in which you have a financial interest, regardless of whether you are required to disclose that interest.³ (Section 87100; Regulation 18700(a).) Within the meaning of the Act, you have a "financial interest" in a governmental decision if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of your economic interests. (Section 87103; Regulation 18700(a).) If the material financial effect is reasonably foreseeable,

² Additional facts provided by you on August 3, 2005.

³ The Act also requires public officials to disclose certain economic interests that may be affected by the official's decision-making. As a trustee, you must disclose in accordance with the conflict of interest code developed by your agency certain personal economic interests that may be materially affected by actions you take in your official capacity. (Sections 87300-87313.) You should review the pertinent disclosure categories of your agency's conflict of interest code to determine if NCCSSC must be disclosed.

and no exception applies, you have a disqualifying conflict of interest and must recuse yourself from discussing and voting on the matter, or otherwise acting in violation of Section 87100. (Section 87105; Regulation 18702.)

The Commission has adopted an eight-step standard analysis for determining whether an official has a disqualifying conflict of interest. (Section 87100; Regulation 18700, subdivisions (b)(1) - (8).)

Step One: Are You a Public Official?

As an elected Member of the Board of Trustees of Peralta Community College District, you are a “member, officer, employee or consultant of a state or local government agency” and therefore, you are a public official subject to the conflict-of-interest provisions of the Act. (Section 82048; Regulation 18701.)

Step Two: Will You Make a Governmental Decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Section 87100; Regulation 18702.1.)

Accordingly, you will “make a governmental decision” if you vote on the development contract decision in your official capacity.

Step Three: What Are Your Economic Interests?

A public official has an economic interest if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the enumerated economic interests, including:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more in fair market value (Section 87103(b); Regulation 18703.2);
- An economic interest in any source of income to him or her, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);

- An economic interest in any source of gifts to him or her, if the gifts aggregate to \$360 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- An economic interest in his or her personal finances, including those of his or her immediate family (Section 87103; Regulation 18703.5.)

You have an economic interest in NCCSSC if you have received from it income aggregating to at least \$500 within 12 months prior to the time when the relevant governmental decision is made. (Section 87103(c); Regulation 18703.3(a)(1).) Section 82030 of the Act defines “income” broadly as “payment received,” including reimbursement for expenses. Nonetheless, “income” does not include reimbursement for travel expenses from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. (Section 82030(b)(2).)

Therefore, if the reimbursement you receive from NCCSSC is for travel-related expenses, then you do not receive income from NCCSSC. Accordingly, you would not be required to disqualify yourself from making a governmental decision that may affect NCCSSC. However, if the reimbursement you receive is not for travel-related expenses, but is income, then you may have a potentially disqualifying economic interest in NCCSSC. For the remainder of this letter, we assume that you have received income from NCCSSC.⁴

Campaign contributions that are required to be reported by Chapter 4 of the Act are not among the enumerated economic interests and are not considered “income” or “gifts.” (Section 82030(b)(1); Section 82028(b)(4).) Therefore, the campaign contributions that you received from the developer are not potentially disqualifying economic interests (discussed below).

Step Four: Is Your Economic Interest Directly or Indirectly Involved in The Governmental Decision That You Would Like To Make?

A person, including a source of income such as NCCSSC, is directly involved in a decision before an official’s agency when that person either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

⁴ While we conclude that the campaign contributions that you received from the developer are not income or gifts to you, note that under certain circumstances discounts or payments to an official’s employer may be imputed to the official. However, such piercing has generally been deemed appropriate only where donations to the nonprofit constitute a significant portion of the official’s salary. (See *Shaw* Advice Letter, No. A-87-045.) The information that you provided does not implicate this interpretation of the Act.

“(2) Is a named party in, or is the subject of, the proceeding concerning the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.” (Section 87103; Regulation 18704.1(a).)

Information that you provided does not indicate that NCCSSC initiated, or is a named party in, or the subject of, the governmental decision before you. Therefore, NCCSSC is not directly involved in the decision in question, but is indirectly involved.

Step Five: Are the Financial Effects on Your Economic Interest Material?

For an indirectly involved nonprofit entity (one with minimal gross receipts) that is a source of income to you, the financial effects are considered material as follows:

“For an entity whose gross annual receipts are \$100,000 or less, the effect of the decision will be any of the following:

“(i) The decision will result in an increase or decrease of the entity’s gross annual receipts for a fiscal year in the amount of \$10,000 or more.

“(ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$2,500 or more.

“(iii) The decision will result in an increase or decrease in the value of the entity’s assets or liabilities in the amount of \$10,000 or more.”

Step Six: Are Material Financial Effects on Your Economic Interest Reasonably Foreseeable?

A material financial effect upon an economic interest is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Section 87103; Regulation 18706(a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

The information that you provided does not indicate that there is a substantial likelihood that NCCSSC will incur any material financial effect as a result of the governmental decision you would like to make. Therefore, the Act does not require you to disqualify yourself from making the decision in question and we do not further analyze your potential economic interest in NCCSSC.

Section 84308: Although you do not have an economic interest in the developer, the Act may still require that you disqualify yourself from making the decision in

question since you received campaign contributions from the developer in the past. According to section 84308, an officer of a public agency is disqualified from participating in certain decisions affecting a party from whom the official has received campaign contributions of more than \$250 within the 12 months preceding the decision. (Section 84308(c); Regulations 18438.1 – 18438.8.) The scope of section 84308 is narrowed, however, by the definition of the term “Agency.” “Agency” does not include local government agencies⁵ whose members are directly elected by the voters where the members are acting as the governing body of the agency, and the body is acting in its entirety as itself or as the ex officio governing body of any other agency. (Section 84308(a)(3); Regulation 18438.1(a)(1).) Thus, section 84308 does not apply to you since the information that you provided indicates that you are a member of an agency whose members are directly elected and the agency will be acting as the governing body in its entirety as itself.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Crystal Muhlenkamp
Intern, Legal Division

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⁵ We have advised that a community college district is a local government agency. (*Washington* Advice Letter, No. A-02-034a.)